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IN THE UNITED STATES DISTRICT COURT  
  
FOR THE DISTRICT OF OREGON  
  
PORTLAND DIVISION

LORIANN ANDERSON, KERRIN FISCUS,  
KENNETH HILL, RENE LAYTON,  
MICHAEL MILLER, BERNARD PERKINS,  
DENNIS RICHEY, KATHIE SIMMONS,  
KENT WILES, and MELINDA WILTSE, as  
individuals and representatives of the  
respective requested classes,

Case No. 3:18-cv-02013-HZ

**UNION DEFENDANTS' NOTICE OF  
SUBSEQUENT AUTHORITY**

Plaintiffs,

v .

SERVICE EMPLOYEES  
INTERNATIONAL UNION (SEIU) LOCAL  
503, OREGON PUBLIC EMPLOYEES  
UNION (OPEU); OREGON AFSCME  
COUNCIL 75, labor organizations; KATY  
COBA, in her official capacity as Director of  
the Oregon Department of Administrative  
Services; JACKSON COUNTY, LANE  
COUNTY, MARION COUNTY,

WALLOWA COUNTY, CITY OF  
PORTLAND, political subdivisions of the  
State of Oregon; WESTERN OREGON  
UNIVERSITY, a public higher educational  
institution; NORTHWEST SENIOR &  
DISABILITY SERVICES, a local  
intergovernmental agency,

Defendants.

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*Attorney for Defendant SEIU Local 503, OPEU*

Defendants Oregon AFSCME Council 75 and SEIU Local 503, OPEU respectfully give notice of the Order Granting Defendants' Motion to Dismiss in *Terry C. Cooley v. California Statewide Law Enforcement Ass'n, et al.*, No. 2:18-cv-02961-JAM-AC, Dkt. 66 (E.D. Cal. July 9, 2019). The Order is attached. The Order is relevant to the Union Defendants' pending Motion to Dismiss (Dkt. 24), and the other Defendants' joinders in that motion (Dkts. 28, 29, 38, 39, 51, 52). The Order addresses claims under 42 U.S.C. §1983 challenging the deduction of union dues based on union membership and dues deduction authorization agreements signed before *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (June 27, 2018). The same legal issues are presented in this case.

DATED: July 9, 2019

Respectfully submitted,

By: /s/ Matthew J. Murray  
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

TERRY C. COOLEY, on behalf of  
himself and all others similarly  
situated,

Plaintiff,

v.

CALIFORNIA STATEWIDE LAW  
ENFORCEMENT ASSOCIATION, et al.,

Defendants.

No. 2:18-cv-02961-JAM-AC

**ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS**

This case arises out of Plaintiff Terry Cooley's attempt to end his union membership after the Supreme Court's decision in Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448 (2018) ("Janus"). Terry Cooley ("Plaintiff" or "Mr. Cooley"), brings this putative class action alleging the California State Law Enforcement Association ("CSLEA" or "the Union") violated his constitutional rights by refusing to accept his resignation from union membership, by continuing to deduct union-related fees from his paycheck, and for having assessed him the equivalent of now-impermissible agency fees. Mr. Cooley seeks a declaratory judgment, an injunction, and a refund of certain payments made to the Union.

CSLEA and the California Association of Law Enforcement Employees ("CALEE"; and with CSLEA, the "Union Defendants") move

1 to dismiss Mr. Cooley's claims. Union Mot., ECF No. 58.

2 Defendant Xavier Becerra (the "State") moves to dismiss Mr.

3 Cooley's claims that California Government Code Sections 1152(a)

4 and 1153(a) are unconstitutional. State Mot., ECF No. 59.

5 For the reasons set forth below, this Court GRANTS the Union  
6 Defendants' and State's motions.<sup>1</sup>

7 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

8 A recitation of the primary factual allegations in this case  
9 can be found in a prior order issued by this Court and will not  
10 be repeated here. See Cooley v. California Statewide Law Enf't  
11 Ass'n, No. 2:18-CV-02961-JAM-AC, 2019 WL 331170, at \*1-2 (E.D.  
12 Cal. Jan. 25, 2019). In that prior order, this Court denied Mr.  
13 Cooley's Motion for a Preliminary Injunction, finding, among  
14 other things, that he failed to establish a likelihood of success  
15 on the merits of his claims. Id.; PI Order, ECF No. 42.

16 On February 22, 2019, Mr. Cooley filed a First Amended  
17 Class-Action Complaint ("FAC") alleging five counts:

18 (1) declaratory judgment; (2) injunctive relief; (3) monetary  
19 relief under 42 U.S.C. § 1983; (4) conversion and trespass to  
20 chattels; and (5) unjust enrichment. FAC, ECF No. 50, ¶¶ 58-68.  
21 The FAC includes additional allegations regarding Mr. Cooley's  
22 purported union membership application (¶¶ 27-32); allegations  
23 that California Government Code Sections 1152(a) and 1153(a) are  
24 unconstitutional (¶¶ 38-40); and allegations as to certain  
25 anticipated affirmative defenses (¶¶ 50-57). But the foundation  
26

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27 <sup>1</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled  
for June 4, 2019.

1 of the FAC remains the same as in the original complaint: that  
2 the Union violated Mr. Cooley's constitutional rights by refusing  
3 to accept his resignation and by continuing to collect money from  
4 his paycheck. Mr. Cooley seeks a refund of all compulsory fees  
5 paid before Janus, and all dues paid after Mr. Cooley's attempted  
6 resignation in the wake of Janus.

7 The Union Defendants move to dismiss the FAC in its  
8 entirety. Union Mot., ECF No. 58. The State moves to dismiss  
9 Mr. Cooley's claims that California Government Code Sections  
10 1152(a) and 1153(a) are unconstitutional. State Mot., ECF No.  
11 59. The Union Defendants join the State's motion. ECF No. 60.  
12 Mr. Cooley opposes the motions. Opp'n to Union Mot., ECF No. 61;  
13 Opp'n to State Mot., ECF No. 62.

## 14 II. OPINION

### 15 A. Right to Resign Membership Immediately

16 Mr. Cooley argues that, under Janus, he has a constitutional  
17 right to resign his union membership at his discretion and with  
18 immediate effect. As this Court explained in its prior order,  
19 Janus did not explicitly announce the right of resignation Mr.  
20 Cooley seeks to enforce. PI Order at 5-6. Janus invalidated  
21 non-consensual fees charged by unions to nonmembers (i.e. "agency  
22 fees"). Janus, 138 S. Ct., at 2486. The relationship between  
23 unions and their members was not at issue in Janus. Id. at 2461.  
24 Here, unlike in Janus, Mr. Cooley voluntary agreed to become a  
25 dues-paying member of the Union, and acknowledged restrictions on  
26 when he could withdraw from membership. ECF No. 50-9. Janus did  
27 not automatically undo Mr. Cooley's agreement to be a member of  
28 the Union, nor did it render the collective bargaining

1 agreement's withdrawal limitation provision unenforceable. See  
2 Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991).

3 B. Refund of All Dues Paid Post-*Janus*

4 Mr. Cooley further contends, with his attempted resignation  
5 after Janus, he revoked any purported consent to pay the Union  
6 and that the Union must therefore refund to him all dues deducted  
7 from his paycheck after he announced his desire to withdraw from  
8 the Union. But, as this Court has previously explained, the  
9 continued deduction of dues by the Union here does not offend the  
10 requirement of freely given, affirmative consent of nonmembers  
11 discussed in Janus. PI Order at 7-8.

12 The collective bargaining agreement's limitation on the  
13 period of membership withdrawal is valid and enforceable, as  
14 discussed above, and Mr. Cooley's consent carries through his  
15 membership agreement. Mr. Cooley knowingly agreed to become a  
16 dues-paying member of the Union, rather than an agency fee-paying  
17 nonmember, because the cost difference was minimal. FAC ¶ 13.  
18 That freely-made choice was not without consequences: Mr. Cooley  
19 had to pay dues as long as he remained a member; he could only  
20 withdraw from membership within a certain time frame; and, as a  
21 matter of logic and consistent with the structure of this  
22 arrangement, if he did not withdraw during that time frame his  
23 membership would automatically continue. ECF Nos. 50-1, 50-9.  
24 This was valid assent, and an intervening change in law does not  
25 taint that consent or invalidate his contractual agreement. See  
26 Brady v. United States, 397 U.S. 742, 757 (1970).

27 This Court acknowledges Mr. Cooley's reference to his prior  
28 contractual arguments in order to preserve them for appeal.

1 Opp'n to Union Mot. at 7-9, n.1. As before, this Court is  
2 unpersuaded by these arguments. Moreover, while Mr. Cooley  
3 contends he did not affirmatively agree to continue his union  
4 membership after June 30, 2016, it is worth noting that he did  
5 not, despite paying dues after June 30, 2016, seek to assert  
6 these contract-based arguments of non-membership until the  
7 disparity in payments for members and non-members increased  
8 substantially after Janus was decide.

9 Thus, the Union was contractually authorized to continue  
10 collecting agreed-upon dues from Mr. Cooley, a union member.

11 C. Refund of Compulsory Portion of Membership Dues Paid  
12 Pre-Janus

13 Mr. Cooley asserts an entitlement to a refund of the  
14 compelled portion of his membership dues - equivalent to the  
15 Union's charged fair-share service fee (or agency fee) - paid to  
16 the Union before Janus was decided. FAC ¶¶ 63(a), 68(a). Mr.  
17 Cooley reasons that, even though he voluntarily agreed to join  
18 the Union and pay full membership dues, in the pre-Janus world he  
19 would have, at minimum, been compelled to pay the Union an agency  
20 fee. Mr. Cooley contends that Janus invalidated such agency fees  
21 and, because Janus applies retroactively, a refund is warranted.  
22 This Court finds that the Union owes Mr. Cooley no such refund.

23 First, Mr. Cooley made an affirmative choice to become a  
24 member of the Union, obligating him to pay full membership dues.  
25 As a union member, Mr. Cooley acknowledges he never paid an  
26 "agency fee." Opp'n to Union Mot. at 12 ("Mr. Cooley never paid  
27 agency fees or fair-share fees to anyone; he is demanding a  
28 return of the compulsory portion of his union-membership dues.").



1 But the Union membership dues are deducted as a single charge,  
2 not a split payment for compulsory fees and some extra membership  
3 charge in the manner for which Mr. Cooley seeks reimbursement.  
4 See ECF No. 50-4. Mr. Cooley's contractual dues payments to the  
5 Union were in no part compulsory. Mr. Cooley is not entitled to  
6 a reimbursement for compulsory agency fees which he never paid.

7 Second, and independently, Mr. Cooley's argument relies on  
8 Janus applying retroactively in a manner this Court does not  
9 sanction. This Court acknowledges the general rule that a  
10 "controlling interpretation of federal law must be given full  
11 retroactive effect." Harper v. Virginia Dep't of Taxation, 509  
12 U.S. 86, 97 (1993). But in Janus the Supreme Court itself did  
13 not specify whether the plaintiff was entitled to retrospective  
14 monetary relief for conduct the Supreme Court had authorized for  
15 the previous forty years. See Janus, 138 S. Ct. at 2486  
16 (remanding for further proceedings). This Court declines to  
17 forge new ground and create such liability here. Moreover, this  
18 Court notes that numerous lower courts have denied this  
19 retrospective monetary relief, finding the unions' good-faith  
20 reliance on then-existing law bars liability under Section 1983.  
21 See, e.g., Babb v. California Teachers Ass'n, 378 F. Supp. 3d 857  
22 (C.D. Cal. 2019) (collecting cases).

23 Mr. Cooley's claims seeking a reimbursement of the  
24 compulsory portion of his union dues are dismissed.

25 D. Constitutionality of California Government Code  
26 Sections 1152(a) and 1153(a)

27 Mr. Cooley contends that a public employer must immediately  
28 halt union-related payroll deductions upon learning that an

1 employee has withdrawn his or her "affirmative consent" to those  
2 assessments. FAC ¶ 40 (citing Janus). Mr. Cooley submits that  
3 California Government Code Sections 1152(a) and 1153(a) require  
4 public employers to divert employees' wages to the union upon the  
5 union's request, regardless of whether the employee consents to  
6 the deductions and even if the employee specifically instructs  
7 the employer not to divert his wages to the union. Opp'n to  
8 State Mot. at 1. Thus, Mr. Cooley argues, Sections 1152(a) and  
9 1153(a) are unconstitutional because they prevent public  
10 employers from ending those allegedly impermissible deductions.  
11 Id. ¶¶ 38-40, 58(e), 59(d), 60(d).

12 Mr. Cooley's argument fails for two reasons. First, this  
13 argument hinges on a finding that Mr. Cooley has a First  
14 Amendment right to immediately resign union membership and cease  
15 paying dues. But, as discussed above, Janus did not announce  
16 such a right and no such right exist here. See supra. Second,  
17 the argument fails for the independent reason that the Union's  
18 refusal to immediately accept Mr. Cooley's resignation and cease  
19 fee deductions does not constitute state action.

20 It is well-settled that the First Amendment protects  
21 individuals only from state action, not private action. See,  
22 e.g., Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921,  
23 1928 (2019). There is no argument that the Union is acting as  
24 the state, or that the state itself took direct action. Under  
25 these circumstances, "a State normally can be held responsible  
26 for a private decision only when it has exercised coercive power  
27 or has provided such significant encouragement, either overt or  
28 covert, that the choice must in law be deemed to be that of the

1 State.” Blum v. Yaretsky, 457 U.S. 991 (1982). Mr. Cooley  
2 contends that the Union’s failure to cease deductions is grounded  
3 in compliance with Sections 1152(a) and 1153(a), rather than a  
4 binding obligation to pay based on the terms of his membership.  
5 Opp’n to State Mot. at 3. This theory, unsupported by factual  
6 allegations, is insufficient to withstand a motion to dismiss.  
7 See Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). Indeed, the  
8 FAC includes allegations that the Union attributed its refusal to  
9 accept the resignation to existing contractual rights based in  
10 Article 3.1.A.1. of the collective bargaining agreement, not any  
11 mandate of Sections 1152(a) and 1153(a). FAC ¶ 22.

12 Even still, the existence of these provisions does not  
13 amount to coercive power or compulsion by the state itself. See  
14 Roberts v. AT&T Mobility LLC, 877 F.3d 833, 845 (9th Cir.  
15 2017), cert. denied, 138 S. Ct. 2653, 201 L. Ed. 2d 1051 (2018)  
16 (“Permission of a private choice cannot support a finding of  
17 state action, and private parties do not face constitutional  
18 litigation whenever they seek to rely on some statute governing  
19 their interactions with the community surrounding them.”)  
20 (internal quotation marks and citations omitted); see also Apao  
21 v. Bank of New York, 324 F.3d 1091, 1094–95 (9th Cir. 2003).  
22 Holding otherwise, particularly where, as here, the state took no  
23 direct action and the parties have existing contractual rights,  
24 would stretch state action doctrine beyond its current limits.

25 Nor does the Union’s refusal to accept the resignation  
26 qualify as state action under any other Supreme Court test. See  
27 Naoko Ohno v. Yuko Yasuma, 723 F.3d 984, 995 (9th Cir. 2013)  
28 (“The Supreme Court has articulated four tests for determining

1 whether a [non-governmental person's] actions amount to state  
2 action: (1) the public function test; (2) the joint action test;  
3 (3) the state compulsion test; and (4) the governmental nexus  
4 test.") (internal quotation marks and citations omitted).

5 Thus, Mr. Cooley's constitutional challenge to California  
6 Government Code Sections 1152(a) and 1153(a) is dismissed.  
7 Accordingly, Defendant Xavier Becerra is dismissed from the suit.

8 E. Claims Against CALEE

9 The Union Defendants argue that any claims against CALEE  
10 must be dismissed because the FAC contains no allegations that  
11 CALEE participated in any of the wrongful conduct and does not  
12 allege how CALEE harmed Mr. Cooley. Union Mot. at 4.  
13 Mr. Cooley's opposition does not address this point, and the  
14 Court takes this omission as a concession by Plaintiff that CALEE  
15 should be dismissed as a defendant in this case. This Court also  
16 agrees with the Union Defendants' arguments. Accordingly,  
17 Defendant California Association of Law Enforcement Employees is  
18 dismissed from the suit.

19 F. Conclusion

20 The FAC's five counts seek relief on the overlapping legal  
21 theories addressed above. Mr. Cooley's suit rises and falls with  
22 his claims of constitutional rights violations under Janus.  
23 Because Mr. Cooley's legal theories fail to support any of the  
24 causes of action, each count of the FAC is dismissed.

25 III. ORDER

26 For the reasons set forth above, this Court GRANTS the Union  
27 Defendants' Motion to Dismiss (ECF No. 58) and GRANTS the State's  
28 Motion to Dismiss (ECF No. 59).

1 While leave to amend should be freely given under certain  
2 circumstances, Fed. R. Civ. P. 15(a), in this case Plaintiff has  
3 already amended his complaint once and, given that the legal  
4 issues clearly predominate over any factual disputes, the Court  
5 finds that a second bite at the apple is futile. Plaintiff's  
6 First Amended Complaint is dismissed with prejudice.

7 IT IS SO ORDERED.

8 Dated: July 9, 2019

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11 JOHN A. MENDEZ,  
12 UNITED STATES DISTRICT JUDGE  
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